STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

KRISTOPHER ALLEN HUGHES,

Defendant-Appellant.
_____/

Supreme Court
No. 158652

Court of Appeals
No. 338030

Circuit Court
No. 2016-260154-FC

PLAINTIFF-APPELLEE'S ANSWER IN OPPOSITION TO APPLICATION FOR LEAVE TO APPEAL

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RESPONSE TO JURISDICTIONAL STATEMENT

The People acknowledge that this Honorable Court has jurisdiction to consider Defendant's timely filed application for leave to appeal pursuant to MCR 7.303(B)(1) and MCR 7.305(C)(2)(a).

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. **Was there a plain error that affected Defendant's substantial rights from the introduction in this case of cell phone data evidence already seized and searched by law enforcement pursuant to a valid search warrant in an unrelated case, where reexamination of the data to determine if it was relevant to this case was not a Fourth Amendment violation because the expectation of privacy in the data had already been lawfully frustrated by the valid search warrant?**

The People answer, "no."

Defendant answers, "yes."

II. **Was there a plain error affecting Defendant's substantial rights stemming from the trial court's statements about reviewing transcripts when the trial court never actually foreclosed the jury's ability to review witness testimony and when there is no indication that the jury's deliberations were impacted in any way by the court's statements?**

The People answer, "no."

Defendant answers, "yes."

COUNTER-STATEMENT OF FACTS

Kristopher Allen Hughes, hereinafter referred to as Defendant, was charged in this case with one count of Armed Robbery, contrary to MCL 750.529. The People filed a Notice of Intent to Seek Sentence Enhancement–Fourth or Subsequent Offense with Mandatory 25-Year Minimum. Following a jury trial conducted over the course of three days before the Honorable Hala Jarbou of the Oakland Circuit Court,[1] Defendant was found guilty as charged on March 1, 2017. (T-III, 5–7.)[2] On March 27, 2017, he was sentenced to a term of 25 to 60 years. (S, 11.)

Defendant appealed by right, and the Court of Appeals (TUKEL, PJ, and BECKERING and SHAPIRO, JJ) unanimously affirmed. *People v Hughes*, unpublished per curiam opinion of the Court of Appeals, issued Sept. 25, 2018 (Docket No. 338030). He now seeks leave to appeal.

The Charged Incident:

Ronald Stites, age 71, lived at 17 West Rutgers in Pontiac in August 2016. (T-II, 25–26, 71.) His home was a two-bedroom, single-family house near the intersection of West Rutgers and Baldwin Avenue. (T-II, 26, 28.) He lived alone. (T-II, 27.) His house had both a front door and a back door, but the back door was blocked by his refrigerator and could not be used. (T-II, 39–41.) The front door had a main door and a storm door, both of which had locks. (T-II, 40–41.) Mr. Stites always kept his doors locked, and he would lock them without even consciously realizing it when he entered the house. (T-II, 41–42, 74.)

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[1] Defendant was tried twice on this charge before his conviction, with each of the prior trials ending in a mistrial due to hung juries. This Counter-Statement of Facts is drawn only from the testimony and evidence elicited at the third and final trial that resulted in Defendant's conviction.

[2] The trial and sentencing transcripts in this case are abbreviated as follows:

T-I = Trial, Vol. I, Feb. 27, 2017
T-II = Trial, Vol. II, Feb. 28, 2017
T-III = Trial, Vol. III, Mar. 1, 2017
S = Sentencing, Mar. 27, 2017

It should also be noted that the sentencing transcript was filed under a companion case, Oakland Circuit Court No. 2016-260213-FH. Defendant was sentenced in both cases on the same date.

Mr. Stites had suffered some medical issues over the years that made it difficult for him to stand or walk. (T-II, 27, 71–72.) To help his legs, he would walk from his house to Baldwin, which was about 100 feet away, and then come back. (T-II, 27–28, 72.) He would go back and forth like this until he got tired, then he would go inside his house and rest. (T-II, 29, 72.)

On August 6, 2016, Mr. Stites went for one of his walks in the evening. (T-II, 28, 72.) He used the sidewalk to walk to Baldwin, and as he did so he was approached by a woman. (T-II, 29, 73.) Mr. Stites did not know her name, but she mentioned she had been over to his house in the past. (T-II, 29, 73, 94.) He did not remember her or having her come to his house. (T-II, 29, 94.) He guessed she was a prostitute, but he did not know. (T-II, 29.)

Mr. Stites was getting tired and wanted to go home, and he invited the woman to come inside with him because she "seemed like she didn't have no place to go so I told her she could come on in if she wanted to and watch TV." (T-II, 30, 73.) Once they got back to his house, they sat around and talked while she watched TV in the living room. (T-II, 30, 32.) She mentioned she needed money for food and something to drink. (T-II, 30–31, 73.) They did not talk about her being a prostitute, but one of them did bring up the possibility of the two of them engaging in sex. (T-II, 31, 74.) Mr. Stites later did not remember who brought that idea up. (T-II, 31.)

The woman told Mr. Stites that she would stay all night for $50, and he said ok. (T-II, 32, 74.) He went into his room where he kept his two safes in order to get the money, and she followed him. (T-II, 32–33, 35, 75.) He opened a safe and pulled out a $50 bill from the $4,200 or $4,300 in cash inside. (T-II, 33, 35, 74.) He typically kept only about $1,000 there, but he had withdrawn more money earlier that day to give to his brother, who ended up not needing it. (T-II, 33.) He had not had time to redeposit it. (T-II, 33.) The safe also contained a box of blank checks and other items like a money clip, keys, a credit card, and personal papers. (T-II, 34.)

After getting the $50 bill from the safe, he closed it and locked it. (T-II, 35.) He put the bill in front of the TV stand in the bedroom and told the woman that she could have it when she left in the morning. (T-II, 37–38, 75.) They then talked about having sex, and because Mr. Stites was "not able to perform down here" he performed oral sex on her while lying on the bed. (T-II, 38, 75.) When they finished, she said she was hungry and thirsty, so Mr. Stites told her she could have something from the kitchen. (T-II, 38–39, 76.) She said she wanted to go to the store, though, and picked up the $50 bill and left. (T-II, 38–39, 75–76.)

Mr. Stites did not think the woman was going to come back, but she returned about 15 or 20 minutes later without anything. (T-II, 39, 43, 77.) She was alone. (T-II, 39.) Mr. Stites had locked the door after her, and he had to let her back inside. (T-II, 42, 76.) He locked the doors again behind her. (T-II, 43, 76.) The woman then said something about calling someone to get some drugs and made a phone call. (T-II, 39, 43, 77.) Mr. Stites and the woman watched TV in the living room again while they waited. (T-II, 43–44, 76.) The woman also made herself a cup of coffee. (T-II, 44, 77.)

When a man with the drugs arrived about 20 minutes or so later, the woman got up and let him inside through the front door. (T-II, 44–45, 77–78.) Mr. Stites could not really see the man, who kept his head turned and did not face Mr. Stites. (T-II, 45, 78.) Mr. Stites could tell that the man was black, and he was wearing a light jacket, jeans, and a baseball cap. (T-II, 45–46.) The man walked into the kitchen, and the woman followed him while Mr. Stites stayed in the living room. (T-II, 45–46, 78.) At some point, they came out of the kitchen. (T-II, 46.) Mr. Stites did not see the man give her anything or vice versa. (T-II, 46.) The man had been there for 5 or 6 minutes, and he left. (T-II, 47, 78.) He still did not look toward Mr. Stites as he was leaving. (T-II, 78.)

After the man left, Mr. Stites got up and locked the door. (T-II, 47, 79.) He and the woman went back into the bedroom to resume having sex. (T-II, 47–48, 79.) First, though, she asked Mr. Stites to take "a pop" of a drug, which he believed was crack cocaine, but he said no and told her to take a puff and blow it into his mouth. (T-II, 48, 79, 81.) She did so. (T-II, 48.) The woman then said something about needing a drink of water and left the bedroom. (T-II, 48–49, 82–83.) Mr. Stites was laying on the bed in his briefs. (T-II, 49.)

About a minute later, the woman returned. (T-II, 50.) She did not have a drink in her hand. (T-II, 50.) Mr. Stites began performing oral sex on her again. (T-II, 50, 81–83.) After a minute or so, though, she jumped up, and Mr. Stites saw a black man with a black 40-caliber handgun standing there and pointing the gun right at his face. (T-II, 50–51, 82, 89–90.) Mr. Stites had not heard the door open or the sound of someone breaking into the house. (T-II, 83.) The man was wearing the same clothes as the man who had come earlier to deliver the drugs, and he believed it was the same person. (T-II, 51.) Mr. Stites did not recognize him. (T-II, 51.)

The man with the gun told Mr. Stites to turn over and put his face on the bed or he would be shot, and he complied. (T-II, 51–53, 84, 90.) The man told him to keep his face there and held him down. (T-II, 52.) He did not hear the man make any threats to the woman, who was still there, and then she said something about money being in the safe and there being keys to the safe in the closet. (T-II, 53–55, 84–85, 89–90.) One of them tied Mr. Stites up. (T-II, 56, 84.) The man then told Mr. Stites to give up the combination to the safe, which required both a combination and key to open, but Mr. Stites refused. (T-II, 54–55.) Mr. Stites could also feel items from his closet being thrown on him before he heard the woman say she had found the keys. (T-II, 55–56, 85–86.) He then heard the woman trying to open the safe, but she could not open it. (T-II, 55, 86.) They kept trying to get into the safe for about 10 minutes. (T-II, 56, 86.)

Eventually, Mr. Stites, who was still face down, heard both people leave his house. (T-II, 57–58.) One of them took the safe, but tripped over something as they left. (T-II, 57–58, 86.) Mr. Stites heard the door open twice. (T-II, 58, 87.) He was able to untie himself because the man and woman had not tied him very well. (T-II, 59, 87.) He got up and saw that one of his safes—the one that held his money—was gone. (T-II, 59.) He could not find his phone, so he got dressed, grabbed the keys to his moped, and went to a nearby 7-11 on Baldwin. (T-II, 59–60, 87.) As he was walked out the door, he noticed the owner's manual to the stolen safe, which contained the combinations to both safes, was lying beside the porch. (T-II, 62–63.)

When Mr. Stites got to the 7-11, the clerk let him use the phone after he said he had just been robbed. (T-II, 60, 87–88.) He gave the dispatcher a description of the man and the woman, and he said that they had arrived in a vehicle because they would have had to have had one to transport the safe. (T-II, 64–65, 88.) He then went home to wait for the police. (T-II, 61–62.)

Oakland County Sheriff's Office Deputy Che McNeary was dispatched to Mr. Stites' address at 3:12 A.M. on August 6. (T-II, 153–155, 162.) He arrived at 3:21 and made contact with Mr. Stites and spoke with him about what had happened. (T-II, 155, 161–164.) Mr. Stites said two people who were involved in the crime, a "[w]hite female [and a] black male," and he gave basic descriptions of them. (T-II, 160.) He said that the man had been at his house earlier to drop off some crack to the woman. (T-II, 160–161.) Mr. Stites also pointed out the owner's manual to the safe near the porch. (T-II, 64–65, 156.) He had not touched either the remote control or the coffee cup that the woman had handled, and he told the deputy about both items. (T-II, 66–67, 156.) He also pointed out the rope used to tie him up. (T-II, 67–68, 156.) Dep. McNeary collected all the items as evidence after photographing them. (T-II, 68, 156–159, 165.) After the deputy left, Mr. Stites found his wallet, which he thought had been taken. (T-II, 85.)

Lieutenant Steven Troy of the Oakland County Sheriff's Office is in charge of the detective bureau. (T-II, 166–167.) He assisted in the investigation of the robbery. (T-II, 167–168.) The remote control and coffee cup that Dep. McNeary collected at the scene were sent for fingerprinting. (T-II, 162.) Lt. Troy and the detectives also began searching for prostitutes who matched the description given by Mr. Stites, and they received a tip about a woman named Lisa Weber. (T-II, 168–169, 178–179.)

Mr. Stites later went to the police department a couple times to look at photos of both men and women. (T-II, 68–69.) He saw a woman who looked a lot like the woman who had been in his house, though in the photo she looked in "a little rougher shape." (T-II, 69–70.) He told the police she looked familiar, but he was not sure if it was her because the hair color was different. (T-II, 70, 169–170, 180.) He was not able to identify any men in the photos he was shown. (T-II, 70.) He believed that both the man and the woman were involved in the robbery. (T-II, 89, 91.)

Lisa Weber:

Lisa Weber, age 41, lived in the Pontiac area on August 6, 2016. (T-II, 92.) Ms. Weber had an addiction to crack cocaine at that time, and she used her Social Security money, stole from her mother, and prostituted herself for drugs. (T-II, 92–93, 119–121.) She was the woman whom Mr. Stites met near his home late on August 5 or early on August 6, though she claimed that it was Mr. Stites who stopped her and invited her to his house for coffee before he later asked if she wanted to make some money. (T-II, 94–95, 120, 122, 144.) While she was not looking to make any money at that time, she said yes because of her addiction. (T-II, 95–97, 121–122.) She also told Mr. Stites that she had met him before and been to his house, but he did not remember her because he had "[b]ad memory issues." (T-II, 94, 121.) Ms. Weber also had memory issues, but not nearly as bad as Mr. Stites. (T-II, 118, 121–122, 133.)

When they got back to Mr. Stites' house, he offered Ms. Weber $50 to stay for the night, but she told him it would be more if he wanted her to stay the night. (T-II, 97–98.) She already knew that he wanted to trade the money for oral sex. (T-II, 97, 123.) At some point, Mr. Stites gave her $50 from his wallet. (T-II, 98, 124.) They were in the living room at the time. (T-II, 98–99.) Ms. Weber then made a phone call, and then she left to go to the store to get something to drink and to get some crack. (T-II, 99–100, 124.) She only ended up getting the crack, which she smoked before returning to Mr. Stites' house. (T-II, 100, 124–125, 129, 143–144, 148.)

Mr. Stites let Ms. Weber back into the house when she returned, and at that time she told him about her addiction. (T-II, 100.) He asked her if she could get some crack, and she said yes. (T-II, 100.) He told her to make a call to get some drugs, which she did. (T-II, 101, 127–128.) She called a person she knew as "K-1" or "Killer," whom she had purchased drugs from several times in the past. (T-II, 101, 125–128.) She later identified "K-1" or "Killer" as Defendant. (T-II, 101, 119.) He wore glasses and possibly had a chipped or missing tooth. (T-II, 113, 137–138.) She also bought drugs from another dealer named Mack on occasion. (T-II, 136–137, 142.) Mack lived much farther from Mr. Stites' house than Defendant. (T-II, 143, 145–147.)

Defendant eventually showed up at Mr. Stites' house with some crack, and Ms. Weber met him at the door and let him inside. (T-II, 102, 119, 128.) They went to the kitchen to exchange the drugs and money. (T-II, 102, 128.) Mr. Stites stayed in the living room. (T-II, 102.) Ms. Weber gave Defendant $50 that had been sitting on the table between her and Mr. Stites, which had come from Mr. Stites' wallet. (T-II, 102–103, 128–130.) She then went and sat back down, and Defendant stayed in the kitchen for a while before leaving. (T-II, 103–104, 129.)

Mr. Stites and Ms. Weber then used the crack. (T-II, 104, 124.) She smoked it and blew the smoke into Mr. Stites' mouth a couple times. (T-II, 104.) He also took a hit. (T-II, 104.) After

they used all the crack, they went into the bedroom for the first time and got naked, and Mr. Stites began to perform oral sex on Ms. Weber. (T-II, 104, 131, 139.) He laid on the bed, and she stood over him facing the door. (T-II, 105.) Ms. Weber did not leave the room for a drink, as she had brought a cup of coffee in with her. (T-II, 105.)

A few minutes later, Defendant walked into the room. (T-II, 105, 119.) He pointed a gun at Mr. Stites and Ms. Weber, and he told her to tie Mr. Stites up or he would shoot him. (T-II, 105, 130.) Ms. Weber tied Mr. Stites up, putting his hands behind his back and legs. (T-II, 105.) Defendant told her to turn Mr. Stites over so he was face down, and she did so. (T-II, 105–106.) Once Mr. Stites was tied up, Defendant began "[r]umbling through the room" before grabbing a safe that was in the room and walking out. (T-II, 106–107.) Ms. Weber also might have said something to Defendant about the keys to the safe possibly being in the closet. (T-II, 107, 139.) Mr. Stites had mentioned the key at some point. (T-II, 140.)

Defendant went out the front door, taking the safe with him. (T-II, 107.) After he left, Ms. Weber grabbed her clothes and left. (T-II, 108.) She did not call the police and later claimed that she did not do so because she was scared for her life. (T-II, 108, 135.) She went to a friend's house, and in the following days she continued using drugs. (T-II, 108, 134.) She also had some contact with Defendant during that time because she needed drugs to satisfy her addiction. (T-II, 109–110, 135–136.) Defendant gave her some money when she saw him, which she assumed was "hush money" for her to not call the police. (T-II, 110–111, 135.) She then used the money to buy drugs from him. (T-II, 111, 135–136.)

The Continuing Investigation:

The police eventually contacted Ms. Weber through her mother. (T-II, 108–109, 125, 169.) On August 16, she voluntarily went to speak with the police. (T-II, 109, 180.) She met with

Lt. Troy and Detective Mullins. (T-II, 169.) She explained to them that she knew Mr. Stites from a previous contact with him and that on the night of August 6 they met at the local 7-11 near his house, negotiated a price for sex, and went back to his house where they ordered crack cocaine before they had sex. (T-II, 170–171.) Ms. Weber stated that she called a man known as "Killer" for the drugs and ordered $50 worth, and he brought it to Mr. Stites' house. (T-II, 171.) She said that Mr. Stites purchased the drugs, they smoked them, and then went to the bedroom; she was not sure if "Killer" was still there or not. (T-II, 171, 181–182.) That was when he came into the bedroom with the gun and took the safe. (T-II, 182.)

Lt. Troy consulted a list of individuals with known nicknames to see if he could find someone who went by the name "Killer," because Ms. Weber only knew his nickname. (T-II, 171–172.) On that list, he found that "there was a nickname of Killer which came back to Kristopher Hughes and the Kristopher was spelled with a K instead of C." (T-II, 171–172.) Lt. Troy also already knew the basic description given by Mr. Stites when he called 911. (T-II, 172.) He showed Ms. Weber a photograph of the person—Defendant—and asked if it was "Killer," and she said it was. (T-II, 112, 173, 189.) She also made a written statement. (T-II, 112, 181, 188–189.) Lt. Troy turned the information from the interview over to Det. Mullins. (T-II, 173.)

In late August, Lt. Troy received a lab report with the fingerprint analysis. (T-II, 174.) The report noted that fingerprints matching Ms. Weber had been found on the coffee cup and the remote control. (T-II, 174.) This was after Ms. Weber had already admitted that she was the woman who had been at Mr. Stites' house on August 6. (T-II, 173–174.)

Ms. Weber had two phone numbers that she had been associated with in the past. (T-II, 113.) The first was 810-525-2561 and the other was 248-894-4069. (T-II, 113–114.) She gave up one of the numbers when she was trying to get clean and got the other number, but when she

relapsed her new number "[g]ot out there." (T-II, 114.) In early November 2016, Ms. Weber went back to the police department to talk about phone calls and logs. (T-II, 116–117, 133, 183.) She again spoke with Lt. Troy and Det. Mullins. (T-II, 174.) She was made aware at that time of text messages and phone calls between herself and Defendant, including some that made it look like she was involved in this incident in which she mentioned how many televisions Mr. Stites had in his house. (T-II, 117–118, 132, 140–141, 175.) She did not deny sending any of the text messages or making any of the calls that showed up in the phone records. (T-II, 175, 183–184.) However, she did deny being involved in the armed robbery. (T-II, 175.) At this time, she volunteered information about how she left Mr. Stites' house after she first arrived, bought drugs, and then came back. (T-II, 184–185, 188.) She claimed that she bought the drugs from someone other than Defendant at that time. (T-II, 185–186.)

At the time of Defendant's trial, Ms. Weber claimed that she had not used drugs since coming out of Havenwick in November. (T-II, 115–116, 134.) She had been prescribed some medications, which she used as prescribed. (T-II, 116.) She did not drink alcohol. (T-II, 116.)

Ms. Weber had not been promised or guaranteed that she would not be prosecuted or that she would receive any particular punishment if she was. (T-II, 118, 187.) The prosecutor had told her that she did not know if she would be prosecuted or what her punishment would be. (T-II, 118–119.) The prosecutor had made her no promises at all. (T-II, 119.)

Defendant's Arrest in Another Incident:

On August 12, 2016, Deputy Charles Janczarek was part of a team executing a search warrant, at which time he came into contact with Defendant. (T-II, 190–193.) Defendant was exiting a car on the property where the warrant was being executed when the deputy encountered him. (T-II, 192, 194.) Defendant was detained, and a phone was seized from his person. (T-II,

193–195.) The phone was then turned over to a task force officer, Detective Gorman, who later turned it over to someone else. (T-II, 193–195.)

Cell Phone Forensic Analysis:

Detective Edward Wagrowski is assigned to the Oakland County Sheriff's Office's Computer Crimes Unit. (T-II, 197–198.) He conducts computer forensic examinations and cell phone forensic analyses, including extracting data from cell phones. (T-II, 198.) He has received specialized training to do so. (T-II, 198–199.)

Around August 23, 2016, Det. Wagrowski received a cell phone related to a search warrant execution from Det. Gorman. (T-II, 198–199.) Pursuant to the warrant, Det. Wagrowski was asked to analyze the phone, an LG K7 phone model LG MS330, and extract any information that he could from it. (T-II, 199–200.) He used specialized equipment to perform the extraction and created a report totaling over 600 pages. (T-II, 200–203.) The report included thousands of text messages and photographs, plus other data like call logs. (T-II, 201, 203, 215–216.)

Later, Det. Wagrowski was asked by the prosecutor in this case to search the phone data for the particular phone numbers associated with Ms. Weber, as well as a number associated with Mr. Stites, around August 6, 2016. (T-II, 203–205, 224.) He found 19 call logs for August 6 alone, plus 15 text messages showing contact between the phone and one of Ms. Weber's numbers—which was saved under the contact name "Lisa"—between August 5 and 10, 2016. (T-II, 204–209, 225–227.) He performed searches looking for references in the incoming and outgoing messages to the names "Lisa," "Killer," and "Kristopher," and he received several results for his various searches. (T-II, 208–214, 227–229.) He did not find any text messages associated with the number for "Lisa" that contained the search terms "K-I-L-L" or "Kristopher." (T-II, 229.)

Det. Wagrowski was not part of the investigation of the armed robbery at 17 West Rutgers, as he was only given information about the device he was being asked to analyze. (T-II, 216.) He also had a warrant to ensure that he had authorization to do the extraction. (T-II, 216.) The detective was not familiar with Defendant other than their interactions in the courtroom. (T-II, 216, 218.) The detective had found several photos of Defendant on the phone, some of which had been taken using the phone, in June and July 2016. (T-II, 215–221, 230.)

Procedural Matters:

The trial began on February 27, 2017. (T-I, 3.) Before the potential jurors arrived, the trial court and the parties discussed several preliminary matters. (T-I, 5–15.) This included a defense objection to the admission of certain parts of the cell phone forensic analysis related to the phone seized from Defendant on August 12. (T-I, 5–11.) Defense counsel argued that the information at issue was irrelevant and possibly stale. (T-I, 6–8.) The prosecutor noted that the information she sought to present was focused on calls and text messages on or around the offense date to either Mr. Stites or Ms. Weber. (T-I, 10.) The court ruled that evidence from the phone was relevant given that the phone was on Defendant's person when he was arrested and that any other information that tied him to the phone and related to the offense date could be presented subject to cross-examination. (T-I, 8–10.) There were no other objections on any other basis. (T-I, 5–11.) The prospective jurors arrived shortly thereafter, and jury selection lasted the rest of the morning. (T-I, 15–130.) The jury was sworn just before noon, and the jurors were excused for the afternoon after receiving preliminary instructions. (T-I, 130–144.)

The trial resumed the following morning, February 28, 2017, and the parties presented their opening statements. (T-II, 7–25.) Later, after Det. Wagrowski testified, the jury was briefly excused, and Defendant affirmed that he would not testify. (T-II, 231 – 234.) The court and the

parties discussed the final instructions before the jury returned. (T-II, 234–237.) Once the jury returned, the People and the defense both rested, and the attorneys gave their closing arguments. (T-II, 237–279.) The court then gave the jury its final instructions. (T-II, 281–294.)

The jury began its deliberations at 11:00 A.M. the following morning, March 1, 2017, and returned a verdict finding Defendant guilty as charged just after 2:00 P.M. (T-II, 294; T-III, 3, 5–7.) After the jury was dismissed, Defendant was sworn and pleaded to the habitual offender notice. (T-III, 8.) The court then set a sentencing date before adjourning. (T-III, 8–10.)

On March 27, 2017, Defendant was sentenced to a term of 25 to 60 years. (S, 11.)

Defendant appeals his conviction by right. His appointed appellate counsel raised one issue pertaining to whether an additional search warrant was required before the police could reexamine the data from Defendant's cell phone that they had seized pursuant to the warrant in the other case. In a Standard 4 brief, Defendant raised an issue related to statement made by the trial court to the prospective jurors at the beginning of trial regarding the likelihood of transcripts being available during deliberations in order to review witness testimony. In a unanimous 6-page unpublished per curiam opinion, the Court of Appeals reviewed both issues for plain error because they were not properly preserved. The Court ultimately affirmed Defendant's conviction, concluding that both issues lacked merit. *Hughes*, unpub op at 1–6. Defendant then sought leave to appeal before this Court, acting *in propria persona*.

The People now answer Defendant's application as directed by the Court in an order entered June 12, 2019. *People v Hughes*, ___ Mich ___ (2019) (Docket No. 158652). Additional pertinent facts or procedural history may be discussed in the body of this answer's Argument section to the extent necessary to more fully advise this Honorable Court as to the issues raised.

ARGUMENT

I. **There was no plain error, let alone a plain error that affected Defendant's substantial rights, from the introduction in this case of cell phone data evidence already seized and searched by law enforcement pursuant to a valid search warrant in an unrelated case. The fact that a detective reexamined the data to determine if it was relevant to this case was not a Fourth Amendment violation when the expectation of privacy in the data had already been lawfully frustrated by the valid search warrant.**

Standard of Review & Issue Preservation:

Ordinarily, this Court reviews de novo questions of law relevant to a motion to suppress. *People v Keller*, 479 Mich 467, 473–474; 739 NW2d 505 (2007). Constitutional questions are issues of law. *People v Hill*, 299 Mich App 402, 405; 829 NW2d 908 (2013). Any factual findings by a trial court are reviewed for clear error. *People v Williams*, 472 Mich 308, 313; 696 NW2d 636 (2005).

However, this Court has long held that when a party does not offer an objection in a lower court on the basis later raised on appeal, the alleged error is subject to plain error review. *People v Carines*, 460 Mich 750, 763–764; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, a party must show that (1) an error occurred; (2) the error was plain; and (3) the error affected the party's substantial rights. *Id*. The term "affecting substantial rights" means an error that was "prejudicial: It must have affected the outcome of the . . . proceedings." *People v Grant*, 445 Mich 535, 552–553; 520 NW2d 123 (1994). Even if a plain error occurred that affected a defendant's substantial rights, a reviewing court should only reverse if the defendant is actually innocent of the error seriously affected the fairness, integrity, or public reputation of the judicial proceedings. *Carines*, 460 Mich at 774.

Defendant never objected to the introduction of any data from his cell phone on Fourth Amendment grounds. *See People v Stimage*, 202 Mich App 28, 30; 507 NW2d 778 (1993) ("An objection based on one ground is insufficient to preserve an appellate attack based on a different

ground.") Accordingly, any appellate review of this issue is for plain error affecting his substantial rights, as the Court of Appeals correctly recognized. *Hughes*, unpub op at 2.

Discussion:

This Court should deny Defendant's application for leave to appeal because Defendant has not shown that there was a plain error that affected his substantial rights based on the admission of the text messages and call logs from Defendant's cell phone when that data was searched for and obtained pursuant to a valid search warrant in Defendant's other criminal case. As the Court of Appeals aptly noted, any expectation of privacy Defendant had in the phone's contents had long since been lawfully extinguished by the search warrant that Det. Wagrowski executed in the other case. Defendant does not cite in his application—just as he did not cite below—any authority for the unreasonable proposition that the police and the prosecution are barred from reexamining cell phone data that they have already lawfully obtained in order to determine if any of it is relevant to another criminal case they are investigating. There was no Fourth Amendment violation. Accordingly, Defendant has not shown a plain error, let alone a plain error that affected his substantial rights, and this Court should deny leave to appeal.

A. The law concerning searches, seizures, and search warrants.

A search "for purposes of the Fourth Amendment occurs when the government intrudes on an individual's reasonable, or justifiable, expectation of privacy." *People v Antwine*, 293 Mich App 192, 195; 809 NW2d 439 (2011) (citation and quotation marks omitted). "A seizure of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v Jacobsen*, 466 US 109, 113; 104 S Ct 1652; 80 L Ed 2d 85 (1984). The lawfulness of a search or seizure depends upon its reasonableness. *People v Snider*, 239 Mich App 393, 406; 608 NW2d 502 (2000). "Whether a search is reasonable is a

fact-intensive determination and must be measured by examining the totality of the circumstances." *People v Mullen*, 282 Mich App 14, 21; 762 NW2d 170 (2008), citing *Williams*, 472 Mich at 314. Under the Fourth Amendment, there is a "strong preference for searches conducted pursuant to a warrant." *Illinois v Gates*, 462 US 213, 236; 103 S Ct 2317; 76 L Ed 2d 527 (1983). *See also People v Russo*, 439 Mich 584, 603; 487 NW2d 698 (1992).

A search warrant will only be issued upon a showing of probable cause to justify the search. *People v Martin*, 271 Mich App 280, 298; 721 NW2d 815 (2006); MCL 780.651(1). "Probable cause to issue a search warrant exists where there is a substantial basis for inferring a fair probability that contraband or evidence of a crime will be found in a particular place." *Martin*, 271 Mich App at 298 (internal quotation marks and citation omitted). "If the search warrant is supported by an affidavit, the affidavit must contain facts within the knowledge of the affiant and not mere conclusions or beliefs. The affiant may not draw his or her own inferences, but rather must state matters that justify the drawing of them." *Id.* (citations omitted). The affiant's experience "is relevant to the establishment of probable cause." *People v Waclawski*, 286 Mich App 634, 698; 780 NW2d 321 (2009). Given the strong preference for warrant-based searches, the issuing magistrate's determination of probable cause "should be paid great deference by reviewing courts." *Gates*, 462 US at 236, quoting *Spinelli v United States*, 393 US 410, 419; 89 S Ct 584; 21 L Ed 2d 637 (1969).

B. The search warrant from Defendant's other criminal case was valid. The warrant gave the police the right to search the phone's contents, and it lawfully extinguished any expectation of privacy Defendant had therein.

Defendant never challenged the validity of the search warrant from his other criminal case, which authorized the search and seizure of his cell phone and its contents. He did not do so in the other case itself, and he did not do so in either the trial court or in the Court of Appeals in

this case.[3] The Court of Appeals in fact specifically noted that Defendant did not challenge the warrant's validity. *Hughes*, unpub op at 3 n 1. Moreover, Defendant still does not challenge the validity of the warrant before this Court.[4] Thus, the warrant remains presumptively valid.[5]

Just as he did in the Court of Appeals, Defendant asserts in his application for leave to appeal that a Fourth Amendment violation occurred because the police did not obtain a brand-new, separate search warrant before reexamining the data from his phone for information that might be relevant to *this* case. However, he once again cites no authority to support this particular proposition.[6] Instead, he merely cites to the general and unremarkable proposition articulated by the United States Supreme Court in *Riley v California*, 573 US 373, 385–395; 134 S Ct 2473; 189 L Ed 2d 430 (2014), and noted by the Court of Appeals that "a warrant generally

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[3] Additionally, the People noted in their Court of Appeals brief that neither the affidavit nor the warrant was ever made part of the trial court record. While it is generally impermissible to expand the record on appeal, *e.g.*, *People v Powell*, 235 Mich App 557, 561 n 4; 599 NW2d 499 (1999), the People did not object to the Court of Appeals considering either of those documents, which were attached to Defendant's brief. The People also do not object to this Court considering either of those documents, which are attached to Defendant's application.

[4] While Defendant's application claims that the warrant's validity was not challenged because he entered a plea in the other case, he nonetheless does not now challenge the warrant's validity in any appreciable way as part of his application.

[5] In any event, even if Defendant did challenge the warrant's validity, the People maintain as they did before the Court of Appeals that the affidavit and warrant clearly established probable cause for the seizure of Defendant's cell phone and the subsequent forensic analysis. The affidavit laid out the affiant's experience in narcotics trafficking cases, explained how narcotics traffickers make use of cell phones for data storage and communications related to their illicit activities, and explained how Defendant and his activities related to the investigation. The district court judge who authorized the warrant clearly had a basis for doing so because a reasonably cautious person would have concluded that there was a substantial basis for a finding of probable cause. *Martin*, 271 Mich App at 297–298.

[6] Likewise, the People could not locate any case law—published or unpublished—holding that the Fourth Amendment bars law enforcement from reexamining and then using evidence that was already lawfully obtained in a first case in order to aid in the prosecution of a second case. In fact, in the closest case the People could find with a similar factual pattern, *State v Dominick*, 133 So 3d 250 (La App, 2014), no Fourth Amendment issue was even raised on appeal. In that case, the defendant was charged after contraband was found on his phone, which had been seized and forensically analyzed based on a warrant in a separate case. *Id*. at 252. On appeal, the defendant only raised a sentencing issue. *Id.* at 252–258.

is required before searching the information contained in a cell phone." *Hughes*, unpub op at 3. Defendant's phone, however, was both seized and searched pursuant to a warrant. *Riley*, 573 US at 385–395. Defendant's argument, though, departs from *Riley*, which never held that the police must obtain a new search warrant *every time* the information contained in a cell phone is examined or reexamined after a lawful seizure and search. The absence of such a requirement in Fourth Amendment law is understandable because it would be entirely unreasonable, and the "touchstone of the Fourth Amendment is reasonableness." *Ohio v Robinette*, 519 US 33, 39; 117 S Ct 417; 136 L Ed 2d 347 (1996).

Defendant's argument for a new-warrant-upon-every-reexamination requirement in fact stands contrary to established Fourth Amendment law, as the Court of Appeals explained. *Hughes*, unpub op at 3–4. The United States Supreme Court has long recognized that "[o]nce frustration of the original expectation of privacy occurs, the Fourth Amendment does not prohibit governmental use of the now-nonprivate information." *Jacobsen*, 466 US at 117. Stated otherwise, the only "search" for Fourth Amendment purposes occurs when the amendment's protections are negated by some legitimate means. Any later actions, such as reviewing the information or otherwise reexamining it, are not a "search" within the meaning of the Fourth Amendment. *See People v Woodard*, 321 Mich App 377, 387, 390–391; 909 NW2d 299 (2017), lv den 501 Mich 1027 (2018) (holding that testing of a lawfully obtained blood sample for the presence of alcohol does not constitute a distinct search for Fourth Amendment purposes).

Defendant contends that the Court of Appeals' reliance on *Jacobsen* (and, by extension, *Woodard*[7]) was misplaced because *Jacobsen* arose from a search originally conducted by third-party, non-government actors rather than the police. In doing so, though, he entirely disregards

[7] Defendant does not, however, cite or otherwise discuss *Woodard*.

the broader Fourth Amendment principle that the *Jacobsen* Court articulated. The Fourth Amendment is designed specifically to protect an individual's reasonable, justifiable expectation of privacy in their home and effects. *E.g.*, *Antwine*, 293 Mich App at 195. However, once that expectation of privacy has been legitimately overcome—be it by a third party actor as occurred in *Jacobsen*, a consent search as occurred in *Woodard*, 321 Mich App at 385–395, or a lawfully issued search warrant as occurred in this case—the expectation does not reappear as if by magic, and there are no further Fourth Amendment concerns. As the *Jacobsen* Court succinctly explained, "[t]he Fourth Amendment is implicated only if the authorities use information with respect to which the expectation of privacy has not already been frustrated." *Jacobsen*, 466 US at 117. Whatever expectation of privacy Defendant had in his cell phone and its contents, it had long since been extinguished as a result of the search warrant from his other case by the time Det. Wagrowski reexamined the data to determine if it had any relevance to the instant case. *Id*. The Court of Appeals properly rejected Defendant's argument. *Hughes*, unpub op at 2–4.

C. Conclusion.

There was simply no plain error stemming from the introduction of the cell phone data. *Carines*, 460 Mich at 763–764. There was no Fourth Amendment violation when the cell phone was lawfully seized and its data was lawfully searched pursuant to a valid warrant from Defendant's other criminal case. *See Martin*, 271 Mich App at 297. It was entirely reasonable for the police to reexamine the lawfully obtained evidence to determine if it also was relevant to this case. *Jacobsen*, 466 US at 117. Accordingly, this Court should deny leave to appeal.[8]

[8] Because there was no basis upon which to move for suppression, Defendant's trial counsel was not, as Defendant alternatively asserts, ineffective for failing to make such a motion. *People v Ericksen*, 288 Mich App 192, 205; 793 NW2d 120 (2010) (noting that an attorney is not ineffective when he or she fails to advance a meritless argument or raise a futile objection).

II. **There was no plain error affecting Defendant's substantial rights stemming from the trial court's statements about reviewing transcripts when the trial court never actually foreclosed the jury's ability to review the testimony and when there is no indication that the jury's deliberations were impacted in any way by the court's statements.**

Standard of Review & Issue Preservation:

Ordinarily, appellate courts review de novo claims of alleged instructional error. *E.g.*, *People v Gillis*, 474 Mich 105, 113; 712 NW2d 419 (2006). However, when an issue is not properly preserved for appellate review by a timely objection, it is reviewed for a plain error affecting a party's substantial rights. *Carines*, 460 Mich at 763–764. To avoid forfeiture under the plain error rule, a party must show that (1) an error occurred; (2) the error was plain; and (3) the error affected the party's substantial rights. *Id*. The term "affecting substantial rights" means an error that was "prejudicial: It must have affected the outcome of the . . . proceedings." *Grant*, 445 Mich at 552–553.

The defense did not object to the now-challenged statement by the trial court. Accordingly, any appellate review of this issue is for plain error affecting his substantial rights, as the Court of Appeals correctly recognized. *Hughes*, unpub op at 5–6.

Discussion:

This Court should also deny Defendant's application for leave to appeal because Defendant has not shown that there was a plain error that affected his substantial rights based on the trial court's statements to the jury directing the jurors to pay close attention to the testimony because it would be difficult to quickly obtain transcripts of the testimony if the jury needed to review it during deliberations. Defendant contends that the court's statements "effectively" communicated to the jury that it was forbidden from reviewing any witness testimony, and he argues that there should be a "strong presumption of prejudice" here. Defendant is incorrect. He has not shown a plain error affecting his substantial rights because the court's statements never

actually foreclosed the jury's ability to review witness testimony and because there is no indication whatsoever that the jury's deliberations were actually impacted by the court's statements. Rather, the court's statements merely explained why transcripts would not be immediately available if the jury later wanted to review any testimony. Accordingly, Defendant has not shown a plain error, let alone a plain error that affected his substantial rights, and this Court should deny leave to appeal.

As an initial matter, the People note that Defendant asserts that the Court of Appeals "incorrectly characterized [his] argument as him asserting that this type of error requires automatic reversal" and that "[t]his is not [his] position." [Defendant's Application, at 16.] In other words, Defendant claims the Court of Appeals deliberately mischaracterized his argument and then only addressed the mischaracterized argument rather than his actual argument. This is little more than a specious attempt to discredit the Court of Appeals' analysis. A review of Defendant's Standard 4 brief, in which he first raised this issue, reveals that he *did* in fact argue that the alleged error required automatic reversal under this Court's decision in *People v Smith*, 396 Mich 109; 240 NW2d 202 (1976). In response, the People noted that this Court had later explained in *People v Tucker*, 469 Mich 903, 903; 669 NW2d 816 (2003), that "the plain error rule of *Carines* . . . has superseded the automatic reversal rule of" *Smith*. Defendant's attempt to fault the Court of Appeals for addressing the argument he actually raised, rather than the altered argument he presents now, should be roundly rejected by this Court.

Furthermore, Defendant has not shown a plain error affecting his substantial rights. As the Court of Appeals noted, *Hughes*, unpub op at 4, and this Court has explained, "[a] defendant does not have a right to have a jury rehear testimony. Rather, the decision whether to allow the jury to rehear testimony is discretionary and rests with the trial court." *People v Carter*, 462

Mich 206, 218; 612 NW2d 144 (2000). A trial court only errs, though, when the jury requests to rehear testimony and the trial court instructs the jury in a manner that precludes any possibility of later reviewing that testimony. *Id*. at 208. In this case, the trial court's statements never foreclosed the jury's ability to review the witnesses' testimony as Defendant contends they did. Specifically, the court told the jury:

> Now, just as a preliminary matter, if you haven't noticed we don't have a court reporter in this court or actually in this whole courthouse. All the courtrooms in this courthouse are video courtrooms. So, you can see that there are cameras all around and microphones and so everything is recording. Now, I say that to indicate to you that it used to be that we used to get notes from jurors saying can we have *transcripts* of such and such witness. And, even then when we did have a court reporter, who used to take things down shorthand, it would be difficult obviously to get a *transcript* to the jury. So, that was usually – we weren't able to do that. So, obviously, with a video courtroom we don't have a court report[er] that can *transcribe* things. Things – videos will be sent out and then we get *transcriptions* later.
>
> So, I say that just to say please pay attention and in the end you'll have to rely on your collective memory as to certain things that have occurred or certain witnesses that have testified to things. So, just as a reminder. [(T-I, 23–24) (emphasis added).]

It is clear that the court was simply explaining (while urging the jurors to pay close attention to the witnesses' testimony) that because the courtroom used a video recording system, it would be very difficult to quickly obtain *transcripts* if the jury wanted to review transcripts of a witness's testimony.[9] (T-I, 23–24.) Nothing in the court's statements suggested that the jury, for instance, would be unable to review the video itself or that the transcripts would *never* be available. *See* MCR 2.513(P). The court's statements did not preclude any or all possibility of reviewing the witnesses' testimony, *Carter*, 462 Mich at 208, and thus there was no error as the Court of Appeals correctly recognized. *Hughes*, unpub op at 4–5.

[9] Notably, Defendant claims that the trial court told the jurors that "it would not be possible during their deliberations to review testimony." [Defendant's Application, at 15.] However, this is *not* a quotation from the transcript, and it is *not* what the trial court actually said.

Moreover, Defendant has not presented any evidence that the jury's eventual deliberations were affected in any way by the court's earlier statements. Just before the jury was brought in to deliver its verdict, the court read into the record several notes it had received during deliberations. (T-III, 3–4.) Several of the notes asked to review evidence, but none of them asked to review any witness testimony or otherwise indicated an issue stemming from the court's statements on the first day of trial. (T-III, 3–4.) Quite simply, the record is devoid of *any* indication that the court's pre-testimony statements had any impact whatsoever on the outcome of the case, which Defendant must show to be entitled to appellate relief. *Carines*, 460 Mich at 763–764; *Grant*, 445 Mich at 552–553. Curiously, Defendant asserts that he is not arguing for a rule of automatic reversal; yet, he states that prejudice must be strongly presumed because there is no way of knowing the jurors' thoughts about the court's pre-testimony statements about the transcripts that reversal is required—which was the basis for the automatic reversal rule in *Smith* that has since been superseded. *Tucker*, 469 Mich at 903; *Smith*, 396 Mich at 111. Thus, Defendant advocates for an automatic reversal even while claiming he is not. However, he has not shown a sound basis for abandoning the plain error rule either in this case or in any other.

Ultimately, there was no error, let alone a plain error that affected the outcome of Defendant's trial. *Tucker*, 469 Mich at 903; *Grant*, 445 Mich at 552–553. Accordingly, this Court should deny leave to appeal.

RELIEF

WHEREFORE, Jessica R. Cooper, Prosecuting Attorney in and for the County of Oakland, by Joshua J. Miller, Assistant Prosecuting Attorney, respectfully requests that this Honorable Court deny the application for leave to appeal in its entirety.

Respectfully submitted,

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